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# SHIP'S LIABILITY TO LONGSHOREMEN BASED ON UNSEAWORTHINESS—SIERACKI THROUGH USNER\*

James A. George\*\*

## INTRODUCTION

Built upon historical foundations attacked as faulty and erroneous by Supreme Court Justices,<sup>1</sup> leading commentators<sup>2</sup> and authorities<sup>3</sup> in the field of admiralty and maritime law, the *Sieracki*<sup>4</sup> extension of the protection of the warranty of seaworthiness to longshoremen and other harbor workers has experienced great stimulus in recent years. An example of this growth is seen in the cases of *Law v. Victory Carriers, Inc.*<sup>5</sup> and *Chagois v. Lykes Brothers Steamship Co.*,<sup>6</sup> extending the warranty of seaworthiness a considerable distance beyond the vessel, whether or not the injury-causing instrumentality was an appliance or appurtenance (either temporary or permanent) of the ship.

The process has not been all growth-oriented, however, for on January 25, 1971, the United States Supreme Court limited the scope of remedies previously existing in favor of the longshoremen by handing down its decision in *Usner v. Luckenbach Overseas Corp.*<sup>7</sup> which eliminated the so-called "instantaneous unseaworthiness" action.

This Article will briefly discuss the historical development of the basic principles involved, a growth process which has caused Judge Moore of the Second Circuit to observe that "unseaworthiness may have become a term of art wholly unrelated

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1. Dissent of Justices Stewart and Harlan in *Jackson v. Lykes Bros. S.S. Co.*, 386 U.S. 731, 736 (1967).

2. See, e.g., Shields & Byrne, *Application of the "Unseaworthiness" Doctrine to Longshoremen*, 111 U. PENN. L. REV. 1137 (1963). This article contains an exhaustive survey of both modern and ancient history indicating, according to the author, that the duties of loading and unloading were always entrusted to specialists other than members of the vessel's crew.

3. See, NORRIS, MARITIME PERSONAL INJURIES, § 15 at 30-31 (2d ed. 1966).

4. *Seas Shipping Co., Inc. v. Sieracki*, 328 U.S. 85 (1946).

5. 432 F.2d 376 (5th Cir. 1970).

6. 432 F.2d 388 (5th Cir. 1970).

7. 91 S.Ct. 514 (1971).

to reality."<sup>8</sup> Emphasis will be placed upon recent decisions and an effort will be made to discern some guidelines from these cases as to the future course of these remedies.<sup>9</sup>

#### HISTORICAL BASIS OF THE DOCTRINE OF LIABILITY BASED UPON UNSEAWORTHINESS

The Supreme Court's 1903 decision in *The Osceola*<sup>10</sup> is generally regarded as the modern-day<sup>11</sup> fountainhead for the doctrine of ship's liability based upon the vessel's unseaworthiness. In its much-quoted "second proposition," the Court stated "[t]hat the vessels and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship."<sup>12</sup>

However, the process of "complete divorcement of unseaworthiness liability from concepts of negligence," reinforced in the 1971 decision of *Usner v. Luckenbach Overseas Corp.*,<sup>13</sup> had a "humble origin as a dictum in an obscure case in 1922," *Carlisle Packing Co. v. Sandanger*,<sup>14</sup> where the Supreme Court stated:

"[W]e think the trial court might have told the jury that

8. *Tarabocchia v. Zim Israel Navigation Co.*, 417 F.2d 476 (2d Cir. 1969). This case involved a reluctant application of the now discarded "operational negligence" action. See text accompanying note 123 *infra*.

9. This article will not treat the provisions of the Longshoremen's and Harbor Workers' Act or the recent developments affecting jurisdiction of that Act connected with the decision of the United States Supreme Court in *Nacirema Operating Co. v. Johnson*, 396 U.S. 212 (1970). For excellent treatments of these areas, see Donovan, *Practice in the Office of the Deputy Commissioner*, 15 LA. BAR J. 117 (1967); McTamaney, *The Longshoremen's and Harbor Workers Act of 1927: The Twilight Zone After Nacirema*, 1 J. OF MARITIME L. & COM. 443 (1970); Note, 38 FORDHAM L. REV. 545 (1970); Smith, *On the Waterfront at the Pier's Edge: The Longshoremen's and Harbor Workers' Compensation Act*, 56 CORNELL L. REV. 114 (1970). Additionally, the United States Supreme Court's decision in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), granting a death action under the general maritime law will be considered by the author in a subsequent issue of the J. OF MARITIME L. & COM. This decision has been extensively treated in other commentary. See, e.g., Note, 31 LA. L. REV. 165 (1970); Note, 49 TEX. L. REV. 128 (1970); Note, 45 TUL. L. REV. 151 (1970).

10. *The Osceola*, 189 U.S. 158 (1903).

11. An exhaustive discussion of the ancient authority upon which this doctrine is based, beginning with the laws of Oleron, promulgated about 1150 A.D., may be found in the landmark case of *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 544-45 (1960).

12. *The Osceola*, 189 U.S. 158, 175 (1903).

13. 91 S.Ct. 514 (1971).

14. 259 U.S. 255 (1922).

without regard to negligence the vessel was unseaworthy when she left the dock . . . and that if thus unseaworthy and one of the crew received damage as the direct result thereof, he was entitled to recover compensatory damages."<sup>15</sup>

Subsequent decisions emphasized the absolute nature of this obligation. In *The H. A. Scandrett*,<sup>16</sup> the Second Circuit demonstrated the independence of these principles from those related to the duty of the shipowner under the Jones Act<sup>17</sup> to exercise reasonable care:

"In our opinion the libellant had a right of indemnity for injuries arising from an unseaworthy ship even though there was no means of anticipating trouble.

"The ship is not freed from liability by mere due diligence to render her seaworthy as may be the case under the Harter Act (46 U.S.C.A. §§ 190-195) where loss results from faults in navigation, but under the maritime law there is an absolute obligation to provide a seaworthy vessel and, in default thereof, liability follows for any injuries caused by breach of the obligation."<sup>18</sup>

Since 1944, when the Supreme Court decided *Mahnich v. Southern Steamship Co.*,<sup>19</sup> it has been clear that a shipowner is liable for injuries to seamen caused by unseaworthiness of his ship or its equipment. Only two years after it decided *Mahnich*, the Supreme Court made equally clear that the warranty of seaworthiness provided by the general maritime law extends also to longshoremen injured on board ship while working in the service of the ship. This is the *Sieracki* rule.<sup>20</sup> Moreover, it is now established that as long as the longshoreman is actually working in the service of the ship, it does not matter that his injury occurred on shore; the shipowner is still liable for any unseaworthiness of his vessel that causes the longshoreman's injury.<sup>21</sup> This is the rule of the now famous "bean-bag case," *Gutierrez v. Waterman Steamship Corp.*, which held that unsea-

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15. *Id.* at 259.

16. 87 F.2d 708 (2d Cir. 1937).

17. 46 U.S.C. § 688 (1970).

18. *The H. A. Scandrett*, 87 F.2d 708, 711 (2d Cir. 1937).

19. 321 U.S. 96 (1944).

20. *Seas Shipping Co., Inc. v. Sieracki*, 328 U.S. 85 (1946).

21. *Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206 (1963).

worthiness of a vessel could result from defective cargo packaging which caused an unsafe condition on the dock.

The Court in *Gutierrez* based admiralty jurisdiction upon the Extension of Admiralty Jurisdiction Act,<sup>22</sup> and held that "the duty to provide a seaworthy ship and gear, including cargo containers, applies to longshoremen unloading the ship whether they are standing aboard ship or on the pier."<sup>23</sup>

The crux of the rule as stated by the Fifth Circuit recently in its *Chagois v. Lykes* decision is to the effect that the warranty of seaworthiness depends not on plaintiff's status or location, but primarily upon the type of work he does and its relationship to the ship.<sup>24</sup> It is now established in most circuits that a great deal of work connected with loading and unloading the ship is "work in the ship's service," and any longshoreman injured while loading the ship may avail himself of the unseaworthiness remedy.<sup>25</sup>

The *Sieracki* rule was based upon what has been called an erroneous concept, set forth in a 1926 decision of the Supreme Court,<sup>26</sup> that the work of loading and unloading vessels "was a maritime service formerly rendered by the ship's crew."<sup>27</sup> A key to this "most extraordinary expansion"<sup>28</sup> of the doctrine under consideration was provided in *Sieracki* by the following language:

"Historically the work of loading and unloading is the work of the ship's service, performed until recent times by members of the crew. [Citing cases.] That the owner seeks to have it done with the advantages of more modern divisions of labor does not minimize the worker's hazard and should not nullify his protection."<sup>29</sup>

A few years after *Sieracki* was decided, the protection of the warranty of seaworthiness was extended beyond the ship to include longshoremen injured on docks,<sup>30</sup> and then to numerous other classifications of persons such as ship's carpenters,<sup>31</sup> elec-

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22. 46 U.S.C. § 740 (1970).

23. *Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206, 215 (1963).

24. *Chagois v. Lykes Bros. S.S. Co.*, 432 F.2d 388 (5th Cir. 1970), *citing* *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953).

25. *Deffes v. Federal Barge Lines, Inc.*, 361 F.2d 422 (5th Cir. 1966).

26. *International Stevedoring Co. v. Haverty*, 272 U.S. 50 (1926).

27. 272 U.S. 50, 52 (1926), *citing* *Atlantic Transport Co. v. Imbrovek*, 234 U.S. 52 (1914).

28. *Usner v. Luckenbach Overseas Corp.*, 91 S.Ct. 514 (1971).

29. *Seas Shipping Co., Inc. v. Sieracki*, 328 U.S. 85, 96 (1946).

30. *Strika v. Netherlands Ministry*, 185 F.2d 555 (2d Cir. 1950).

31. *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953).

tricians,<sup>32</sup> ship cleaners,<sup>33</sup> repairmen,<sup>34</sup> and riggers<sup>35</sup> who perform jobs formerly done by seamen.<sup>36</sup>

It should also be briefly noted that the longshoreman is able to circumvent the exclusive remedy provisions contained in the Longshoremen's and Harbor Workers' Act,<sup>37</sup> basically the same as that in any other compensation act, by proceeding against his own employer (if that employer is either the bareboat charterer<sup>38</sup> or owner of the vessel) by either an action *in rem* against the vessel itself, an action *in personam* against the vessel owners, operators and/or charterers, or a combination of these actions.<sup>39</sup>

#### WHAT IS "UNSEAWORTHINESS"?

The Fifth Circuit has set the following general guidelines by way of definition of the elusive and enigmatic doctrine of unseaworthiness:

"What is the vessel to do? What are the hazards, the perils, the forces likely to be incurred? Is the vessel or the particular fitting under scrutiny sufficient to withstand those anticipated forces? If the answer is in the affirmative, the vessel (or its fitting) is seaworthy. If the answer is in the negative, then the vessel (or the fitting) is unseaworthy no matter how diligent, careful or prudent the owner might have been."<sup>40</sup>

In *Mitchell v. Trawler Racer, Inc.*,<sup>41</sup> the Supreme Court characterized the obligation in the following language:

"What has been said is not to suggest that the owner is obligated to furnish an accident-free ship. The duty is absolute,

32. *Feinman v. A. H. Bull S.S. Co.*, 216 F.2d 393 (3d Cir. 1954).

33. *Torres v. The Kastor*, 227 F.2d 664 (2d Cir. 1955); *Crawford v. Pope & Talbot, Inc.*, 206 F.2d 784 (3d Cir. 1953).

34. *Read v. United States*, 201 F.2d 758 (3d Cir. 1953).

35. *Amerocean S.S. Co. v. Copp*, 245 F.2d 291 (9th Cir. 1957).

36. See Note, 75 YALE L.J. 1174, 1183 (1966).

37. 33 U.S.C. § 905 (1970).

38. *Reed v. The Yaka*, 373 U.S. 410 (1963).

39. *Jackson v. Lykes Bros. S.S. Co.*, 386 U.S. 731 (1967).

40. *Walker v. Harris*, 335 F.2d 185, 191 (5th Cir. 1964), wherein it was also stated: "Although not articulated in such terms, it is a sort of sea-going *res ipsa loquitur*. Once it is assumed (or judicially held) that the vessel must anticipate the particular hazard and be staunch enough to override it, the only escape from the inference of unseaworthiness is proof that some new, unforeseen, intervening force or factor brought about the failure of ship or gear. There is none of that here." *Id.* at 193.

41. 362 U.S. 539, 550 (1960).

but it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use. The standard is not perfection, but reasonable fitness; not a ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but a vessel reasonably suitable for her intended service."

The most recent attempt by the Supreme Court to delineate some definitional boundaries is contained in the *Usner* opinion:

"*Trawler Racer* involved the defective condition of a physical part of the ship itself. But our cases have held that the scope of unseaworthiness is by no means so limited. A vessel's condition of unseaworthiness might arise from any number of circumstances. Her gear might be defective, [*citing Mahnich v. Southern S.S. Co.*, 321 U.S. 96] her appurtenances in disrepair, [*Seas Shipping Co. v. Sieracki*, 328 U.S. 85], her crew unfit. [*Boudoin v. Lykes Bros. S.S. Co.*, 348 U.S. 336]. The number of men assigned to perform a ship-board task might be insufficient. [*Waldron v. Moore-McCormack Lines*, 386 U.S. 724]. The method of loading her cargo, or the manner of its stowage, might be improper. [*A. & G. Stevedores v. Ellerman Lines*, 369 U.S. 355; *Gutierrez v. Waterman S.S. Co.*, 373 U.S. 206]. For any of these reasons, or others, a vessel might not be reasonably fit for her intended service."<sup>42</sup>

An analysis of recent decisions reveals several interesting examples of circumstances which have been deemed to create unseaworthiness of the vessel. One such condition was found in *Guidry v. Texaco, Inc.*,<sup>43</sup> where the court found unseaworthiness of the vessel due to quarters which were too cramped for the proper discharge of plaintiff's duties while pulling copper tubing in the engine room of the vessel.

Moreover, the United States Supreme Court in *Waldron v. Moore-McCormack Lines*,<sup>44</sup> held that "to be inadequately and improperly manned is a classic case of an unseaworthy vessel," and found the vessel in that case to be unseaworthy where the

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42. *Usner v. Luckenbach Overseas Corp.*, 91 S.Ct. 514, 517-18 (1971).

43. 430 F.2d 781 (5th Cir. 1970). But see *Wilson v. Societa Italiana de Armamento*, 409 F.2d 484 (5th Cir. 1969), where the Court of Appeals for the Fifth Circuit held that the mere fact that an area in which a longshoreman may be obliged to work is cramped or confining does not render the area unsafe as a matter of law.

44. 386 U.S. 724 (1967); see also *June T, Inc. v. King*, 290 F.2d 404 (5th Cir. 1961).

evidence established that the ship was being operated by a two-man crew where a three-man crew was both customary and necessary. There have been several applications of this decision in the past year, including the Fifth Circuit's decision in *Dillon v. M. S. Oriental Inventor*.<sup>45</sup> In the *Dillon* case, plaintiff was a member of a gang storing bales of pulp paper in the lower 'tween deck of the vessel, and his partner on this job had hurt his knee a short time before Dillon's accident. Later in the day his partner's knee gave way causing the load to shift and fall on Dillon. The court found that the impairment of the partner's knee was a condition which had existed for some time prior to the injury and that the vessel was rendered unseaworthy by that condition.

Other examples of unseaworthiness include failure of the ship's ventilation system which allowed the men and the crew to be overcome by fumes in the lower hold,<sup>46</sup> oil on the engine room floor where the petitioner was required to work,<sup>47</sup> collapse of the shore-based movable crane used in connection with the unloading of the vessel,<sup>48</sup> collapse of a ladder used by the crew,<sup>49</sup> and unexplained collapse of cargo stacks in the hold.<sup>50</sup>

#### WHO IS ENTITLED TO THESE REMEDIES?

*Employment Must Be "In Service of the Ship"—  
When is a "Ship" Not a Ship?*

Under *Sieracki*, the warranty of seaworthiness was extended to shore-based workers engaged in work traditionally that of a seaman which, of course, requires that the situs of the employment be a "vessel" and that it be "in active maritime service."<sup>51</sup>

45. 426 F.2d 977 (5th Cir. 1970); see also *Moschi v. S.S. Edgar F. Luckenbach*, 424 F.2d 1060 (5th Cir. 1970).

46. *McInnis v. Hamburg Am. Lines*, 317 F. Supp. 1395 (N.D. Cal. 1970).

47. *Olin Mathieson Chem. Corp. v. United Stevedoring Div., States Marine Lines, Inc.*, 317 F. Supp. 1373 (S.D. Tex. 1969).

48. *Williams v. Ocean Transp. Lines, Inc.*, 425 F.2d 1183 (3d Cir. 1970).

49. *Shaw v. Lauritzen*, 428 F.2d 247 (3d Cir. 1970).

50. *Scott v. S.S. Ciudad de Ibague*, 426 F.2d 1105 (5th Cir. 1970); *LaCapria v. Compagnie Maritime Belge*, 427 F.2d 244 (2d Cir. 1970). An exhaustive collection of factual situations under which unseaworthiness has been found to exist (and also categorizing the few decisions where the vessel was found to be seaworthy) may be found in NORRIS, MARITIME PERSONAL INJURIES § 54 at 121, 128 (1966). See also Woods, *The Law's Concern for Those That Go Down to the Sea in Ships*, 23 ARK. L. REV. 567, 584-90 (1970).

51. *West v. United States*, 361 U.S. 118 (1959). The question whether the vessel upon which the injury occurred "is in active maritime service," discussed in this section, is to be distinguished from the separate and distinct



For instance, in *Atkins v. Greenville Shipbuilding Corp.*,<sup>52</sup> the Fifth Circuit held that a floating dry dock was not a "vessel" for purposes of the warranty of seaworthiness where its position was maintained by cables running to the bank, and it was without motive power of its own.

The leading case in this area is *West v. United States*,<sup>53</sup> involving a "Liberty" ship of World War II vintage which had been taken out of the mothball fleet to be reactivated for the Korean Conflict. The Court found that at the time of the plaintiff's injury, the vessel was undergoing a complete overhaul, and held that the ship was therefore not in active maritime service. The United States Supreme Court stated the test to be one involving "the status of the ship, the pattern of the repairs, and the extensive nature of the work contracted to be done."<sup>54</sup>

In several decisions of the Fifth Circuit in the past year, great weight has been given to the tests dictated by the *West* decision, particularly with reference to the extensiveness of the repairs. Several of these decisions including *Baum v. United States*<sup>55</sup> and *Watz v. Zapata Off-Shore Co.*<sup>56</sup> have held that the vessels in question were "dead ships" and that no warranty of seaworthiness was available to the plaintiffs.<sup>57</sup>

#### *Employment Must Be "Work Traditionally Done by Seamen"*

The second part of the double test is whether the person in

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area relating to injuries to shipyard employees caused by conditions over which the shipowner had no control and which formed a part of the repair contract.

52. 411 F.2d 279 (5th Cir. 1969), *cert denied*, 396 U.S. 846 (1969); *see also* Cope v. Vallette Dry Dock Co., 119 U.S. 625 (1887); Russell v. Greenville Shipbuilding Corp., 428 F.2d 1168 (5th Cir. 1970); Gretna Machine and Iron Works, Inc. v. Neuman, 316 F. Supp. 147 (E.D. La. 1970); Kelso Marine, Inc. v. Hollis, 316 F. Supp. 1271 (S.D. Tex. 1970); American Mutual Liab. Ins. Co. v. Neuman, 318 F. Supp. 398 (S.D. Ala. 1969); Snyder v. A Floating Dry Dock, 22 F. Supp. 685 (D.C. N.J. 1884).

53. 361 U.S. 118, 122 (1959); *see also* Roper v. United States, 368 U.S. 20 (1961).

54. *West v. United States*, 361 U.S. 118 (1959).

55. 427 F.2d 215 (5th Cir. 1970).

56. 431 F.2d 100 (5th Cir. 1970).

57. *See also* Delome v. Union Barge Line Co., 444 F.2d 225 (5th Cir. 1971); Johnson v. Oil Transp. Co., Inc., 440 F.2d 109 (5th Cir. 1971); Parker v. Cargill, Inc., 417 F.2d 772 (5th Cir. 1969); McCown v. Humble Oil & Ref. Co., 405 F.2d 596 (4th Cir. 1969); Vessella v. United States, 405 F.2d 589 (4th Cir. 1969); Moye v. Sioux City & New Orleans Barge Lines, Inc., 402 F.2d 238 (5th Cir. 1968); *cert. denied*, 395 U.S. 913 (1969); Lawlor v. Socony-Vacuum Oil Co., Inc., 275 F.2d 599 (2nd Cir. 1960); Allen v. Union Barge Line Corp., 239 F. Supp. 1004 (E.D. La. 1965).

question is performing work "traditionally" done by seamen. In most cases, although the "dead ship" defense may not be available to the shipowner, it is found as a fact that the work which was being done by the injured person is of such a highly specialized nature that it was never performed by a seaman. Under this finding, of course, the vessel does not afford the warranty of seaworthiness under the *Sieracki* rule. In a recent Fifth Circuit decision on this question, the facts indicated that the Esso Jamestown required repairs to a main bearing while in the Port of Baton Rouge. A welding crew was called out to the ship, and the plaintiff's injury was caused while his repair crew was in the process of working on the bearing. While the question of the Esso Jamestown being a "dead ship" played no part in the decision, the Fifth Circuit held that the ship's warranty of seaworthiness did not extend to non-crew members regarding transitory conditions created by an outside repair crew during the course of substantial repairs to an existing unseaworthy condition where the transitory condition relates to the subject matter of the repair contract.<sup>58</sup> In another Fifth Circuit decision, the injured person was found to have been performing a highly specialized service aboard the vessel, and the court held that shipowners did not owe the plaintiff the warranty of seaworthiness. However, the lower court award of \$160,000 was affirmed on a finding that the shipowner was negligent.<sup>59</sup>

Two decisions handed down by the Fourth Circuit in 1969<sup>60</sup> dealt with the question of whether a marine electrician and a sandblasting operator were owed the warranty of seaworthiness; the court decided that these persons contributed services of such a highly specialized nature that the warranty of seaworthiness could not be extended to them. One decision,<sup>61</sup> however, left the door open for the plaintiff to go back to the trial court to

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58. *Patterson v. Humble Oil & Ref. Co.*, 423 F.2d 883 (5th Cir. 1970). *But see* *Allen v. Union Barge Line Corp.*, 239 F. Supp. 1004 (E.D. La. 1965), *aff'd*, 361 F.2d 217 (5th Cir. 1966), *cert. denied*, 385 U.S. 1006 (1967), where a ship-fitter was accorded protection of the warranty while working on a propeller of a vessel on the ways. The court found the vessel was in navigation and that plaintiff was performing work traditionally done by seamen.

59. *Drake v. E. I. Dupont de Nemours & Co.*, 432 F.2d 276 (5th Cir. 1970). It is to be noted that in this case the court made an express finding that the vessel was in navigation. *Id.* at 278.

60. *McCown v. Humble Oil & Ref. Co.*, 405 F.2d 596 (4th Cir. 1969); *Vesella v. United States*, 405 F.2d 599 (4th Cir. 1969).

61. *McCown v. Humble Oil & Ref. Co.*, 405 F.2d 596 (4th Cir. 1969).

attempt to prove a maritime tort action against the shipowner.<sup>62</sup> These decisions are based upon the *Halecki* decision, decided by the United States Supreme Court in 1959, in which the test was set forth that the entire repair job should be examined rather than only the part in which the injured person was working.<sup>63</sup>

RECENT DEVELOPMENTS  
EXPANDING RIGHTS OF LONGSHOREMEN

*Expansion of Terms "Loading" and "Unloading"*

The Fifth Circuit has made clear in the *Chagois* and *Law* cases<sup>64</sup> that it will extend the "humanitarian policy which underlies the doctrine" set out in the *Sieracki* case liberally and to a considerable distance from the vessel itself. A similar decision was rendered recently by the District Court for the Eastern District of Pennsylvania in the *Byrd* case,<sup>65</sup> in which the petitioner and another longshoreman were trying to move a forklift truck, intended to be loaded aboard the defendant's vessel as cargo, from the back to the front of the pier. The men were using another forklift truck to perform this task and as the plaintiff was trying to attach a tow to the forklift truck to be used to tow the cargo, he was caught between the two and injured. The court rejected the shipowner's argument that the activity in which plaintiff was engaged on the pier was not the actual loading operation of the ship. As in the recent Fifth Circuit decisions, the court deciding *Byrd* rejected a restrictive interpretation of the term "loading" and stated the test to be whether or not plaintiff's actions at the time of the accident were "direct, necessary steps in the physical transfer" of the cargo in question.<sup>66</sup>

As noted above, *Sieracki* set the cast for later decisions in this area and paved the way for such results as those reached in *Byrd*, *Chagois* and *Law* by its instruction that the longshoreman's protection should not be nullified by "more modern divi-

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62. *Id.* at 599.

63. *United New York & New Jersey Sandy Hook Pilots Assn. v. Halecki*, 358 U.S. 613 (1959).

64. *Chagois v. Lykes Bros. S.S. Co.*, 432 F.2d 388 (5th Cir. 1970); *Law v. Victory Carriers, Inc.*, 432 F.2d 376 (5th Cir. 1970).

65. *Byrd v. American Export Isbrandtsen Lines, Inc.*, 300 F. Supp. 1207 (E.D. Penn. 1969).

66. *Id.* at 1208, *citing* *Litwinowicz S.S. Co. v. Weyerhaeuser S.S. Co.*, 179 F. Supp. 812 (E.D. Penn. 1959).

sions of labor."<sup>67</sup> When *Gutierrez*<sup>68</sup> subsequently moved unseaworthiness ashore by introducing "unseaworthiness" into the law, few inhibiting barriers remained to such extensions as those created in the recent decisions.

The pattern of opening the *Sieracki* umbrella to cover an expanding group of persons and factual situations was continued with the Supreme Court's decision in *Pope & Talbot, Inc. v. Hawn*.<sup>69</sup> There the Court extended *Sieracki*'s protection to a ship's carpenter, holding that application of the warranty of seaworthiness depended not upon plaintiff's status or location, but primarily upon the type of work he does and its relationship to the ship.

A direct application of the Court's qualification in *Sieracki* was made in *Rodriguez v. Coastal Ship Corp.*<sup>70</sup> where the longshoreman was injured aboard ship while attempting to open a hatch during the loading operation. He had slipped on oil which had dripped from an overhead gantry crane. The vessel involved in *Rodriguez* was in an experimental stage and the shipowner argued that the doctrine announced in *Sieracki* was a "relative concept" and that the experimental vessel was "reasonably fit for its intended service." Quoting from *Sieracki*, the court said that the costs of experimental activities were to be borne by the shipowner, not the longshoreman, and that therefore the doctrine of seaworthiness applied.

Several years prior to *Gutierrez* the District Court for the Eastern District of Pennsylvania had already "moved the warranty of seaworthiness ashore" in *Litwinowicz v. Weyerhaeuser Steamship Co.*<sup>71</sup> There, two longshoremen were injured while working in a railroad gondola car situated on the pier alongside the vessel. They were injured while attaching a piece of equipment provided by the stevedore<sup>72</sup> to a load of steel beams. This

67. *Seas Shipping Co., Inc. v. Sieracki*, 328 U.S. 85 (1946).

68. *Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206 (1963), recently described by Chief Judge Brown of the Fifth Circuit as "a beanworthy case." *Burrage v. Flota Mercante Grancolombiana*, 431 F.2d 1229, 1231 (5th Cir., 1970). See also Note, 2 J. OF MARITIME L. & COM. 871 (1971).

69. 346 U.S. 406 (1953).

70. 210 F. Supp. 38 (S.D. N.Y. 1962).

71. 179 F. Supp. 812 (E.D. Penn. 1959).

72. Subsequent decisions of the Supreme Court have established the rule that the shipowner's warranty of seaworthiness extends to equipment supplied by the stevedore. *Alaska S.S. Co., Inc. v. Petterson*, 347 U.S. 396 (1954), *aff'g per curiam*, 205 F.2d 578 (9th Cir. 1953); *Rogers v. United States Lines*,

case allowed recovery over an argument that plaintiffs were merely preparing the cargo for handling, and made the following oft-quoted observation:

"The term loading is not a word of art, and is not to be narrowly and hypertechnically interpreted. Plaintiffs' actions at the time of the accident were direct, necessary steps in the physical transfer of the steel from the railroad car into the vessel, which constituted the work of loading."<sup>73</sup>

Several Third Circuit decisions<sup>74</sup> and a Ninth Circuit decision<sup>75</sup> all applied the warranty of seaworthiness to longshoremen injured in the loading or unloading process. In *Spann v. Lauritzen*,<sup>76</sup> a longshoreman was engaged in operating the control lever of a hopper situated on a pier in which nitrate of soda would be dumped from the ship's hold by a large crane. *Hagans v. Ellerman & Bucknall Steamship Co.*<sup>77</sup> went one step further as the plaintiff there was in a warehouse unloading bags of sand from a flat truck into which they had been off-loaded from the vessel in an earlier stage of the operation. *Thompson v. Calmar Steamship Corp.*<sup>78</sup> involved facts similar to *Litwinowicz* in that plaintiff was injured while helping unload a railroad gondola car on the pier. However, ship's equipment was directly attached to the gondola car in *Thompson*, whereas no ship's gear was directly involved in *Litwinowicz*.

Of this group of cases, only *Huff v. Matson Navigation Co.*<sup>79</sup> involved an injury aboard a vessel, but the instrumentality causing the injury was not part of the ship's gear although it was temporarily attached to the vessel at the time of the accident. The equipment involved in the *Huff* decision was a "scraper" used to drag sugar from the side of the hold to a pile where it could be picked up by scoops on a "marine leg," or conveyor mechanism. The court, after a comprehensive review of authori-

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347 U.S. 984 (1954) *rev'g per curiam*, 205 F.2d 57 (3d Cir. 1953); *see also* *Italia Societa Per Azioni Di Naviazione v. Oregon Stevedoring Co.*, 376 U.S. 315 (1964).

73. *Litwinowicz v. Weyerhaeuser S.S. Co.*, 179 F. Supp. 812, 817-18 (E.D. Penn. 1959).

74. *Spann v. Lauritzen*, 344 F.2d 204 (3d Cir. 1965); *Thompson v. Calmar S.S. Corp.*, 331 F.2d 657 (3d Cir. 1964); *Hagans v. Ellerman & Bucknall S.S. Co.*, 318 F.2d 563 (3d Cir. 1963);

75. *Huff v. Matson Navigation Co.*, 338 F.2d 205 (9th Cir. 1964).

76. 344 F.2d 204 (3d Cir. 1965).

77. 318 F.2d 563 (3d Cir. 1963).

78. 331 F.2d 657 (3d Cir. 1964).

79. 338 F.2d 205 (9th Cir. 1964).

ties, reversed the district court's ruling against plaintiff, holding that he was engaged in ship's service and was thus entitled to the warranty of seaworthiness.

Against this background, the Fifth Circuit first joined those circuits giving liberal application to the warranty of seaworthiness in 1966 with its decision in *Deffes v. Federal Barge Lines, Inc.*<sup>80</sup> Plaintiff was aboard the Barge FBL 625 assisting in the unloading of grain with the use of a shore-based "marine leg." At the time of his injury, plaintiff was sweeping grain into the "marine leg" which was resting on the bottom of the barge, although it was not permanently attached to the vessel. Relying primarily upon *Huff v. Matson Navigation Co.*, the Fifth Circuit rejected the minority view of the Second and Sixth Circuits in the cases of *Forkin v. Furness, Withy & Co.*<sup>81</sup> and *McKnight v. Paterson & Sons, Ltd.*,<sup>82</sup> and held that "a defective marine leg used in unloading grain makes a barge unseaworthy."<sup>83</sup>

The *Huff* opinion closely scrutinized the minority view limiting the extension of the warranty, and stated in part:

"It seems apparent that the departure of McKnight and Forkin from the settled principles of the cases decided by the Supreme Court, by writing into their decisions exceptions neither found nor suggested in any Supreme Court case, is due to the rejection by the opinions in McKnight and Forkin of the rationale of *Sieracki* and of the cases which have flowed from it."<sup>84</sup>

Moreover, while the *Huff* opinion did note some factual distinctions between the situation there involved and that in the *Forkin* case, it declined to base its result upon any such distinction. Instead it refused to follow *Forkin* on "the broader ground that the basic theory there applied is manifestly wrong and contrary to the controlling decisions, as noted in the dissenting opinion in that case."<sup>85</sup>

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80. 361 F.2d 422 (5th Cir. 1966).

81. 323 F.2d 638 (2d Cir. 1963).

82. 181 F. Supp. 434 (N.D. Ohio 1960), *aff'd*, 286 F.2d 250 (6th Cir. 1960).

83. *Deffes v. Federal Barge Lines, Inc.*, 361 F.2d 422, 427 (5th Cir. 1966).

84. 338 F.2d 205, 215 n.12 (9th Cir. 1964).

85. *Huff v. Matson Navigation Co.*, 338 F.2d 205, 215 (9th Cir. 1964). For other decisions which follow the more restrictive interpretation of the phrases "loading" and "unloading," see *Drumgold v. Plovba*, 260 F. Supp. 983 (E.D. Va. 1966); *Daniel v. Skibs, A/S Hilda Knudsen*, 253 F. Supp. 758 (E.D. Penn. 1966), *aff'd*, 368 F.2d 178 (3d Cir. 1962); *Partenweederei, M/S Belgrano v. Weigel*, 299 F.2d 897 (9th Cir. 1962). Other holdings in line with the Fifth Circuit's

*Chagois* involved a member of a dock crew working in a boxcar from which rice was being discharged into the hold of the ship through a marine leg. The opinion indicates that by means of shovels and an electric auger which the plaintiff was handling at the time of his accident, the loose rice was fed into the hopper which moved the rice to the top of the elevator and then into the ship's hold. Chagois was injured while he was holding the auger; the Fifth Circuit, noting that "Chagois's activities in the boxcar were 'direct, necessary steps in the physical transfer' of the loose rice from the railroad cars on the pier into the ship's hold,"<sup>86</sup> held he was protected by the ship's warranty of seaworthiness.

In *Law*, the court dealt with a member of a dock gang who was operating a forklift truck, carrying cargo to a hookup point alongside the S.S. Sagamore Hill. As he was operating the forklift, the overhead protection rack came loose and caused the injuries sued upon. The court, in an opinion containing an extensive treatment of the development of this entire area, reversed the trial court and remanded for further proceedings holding that the plaintiff was protected by the warranty of seaworthiness. The court concluded:

"We do not have here an accident occurring in some urban enclave or pastoral pasture far removed from the pier. On the contrary, Law's activities had proximity to and continuity with the job at hand—the task of loading cargo aboard the Sagamore Hill. His specific job performance was so integrally woven into the entire loading operation that the two cannot be separated except by the erection of hyper-technical and unrealistic legal barriers. If the terms 'loading' and 'unloading' are to be terms associated with reality rather than mere conceptual microcosms without adjuncts beyond the ship's beam, we have no choice but to conclude that plaintiff Law was engaged in loading the Sagamore Hill. We therefore hold that on the facts of this case . . . plaintiff was within the scope of the warranty of seaworthiness."<sup>87</sup>

As noted, the *Law* opinion attempts to draw some rough

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decisions in *Chagois* and *Law* include *Gebhard v. S.S. Hawaiian Legislator*, 425 F.2d 1303 (9th Cir. 1970); *Hagans v. Ellerman & Bucknall S.S. Co.*, 318 F.2d 563 (3d Cir. 1963); *Olvera v. Michalos*, 307 F. Supp. 9 (S.D. Tex. 1968).

86. 432 F.2d 388, 393 (5th Cir. 1971).

87. 432 F.2d 376, 385 (5th Cir. 1971).

boundaries around its extension of the warranty of seaworthiness to the facts of that case—"a longshoreman, intimately involved in the process of loading a vessel, injured as he moved cargo from the back to the front of the dock."<sup>88</sup> A recent decision of the United States District Court for the Eastern District of Louisiana has drawn the line. In *Young v. Chevron Oil Co.*,<sup>89</sup> a worker was injured when a land-based crane overturned in the process of moving cargo from the dock to the storage area. The evidence showed that the cargo had been unloaded from the M/V Rough Tide at least one hour before plaintiff started his work. Due to the lapse of time, his act was "not sufficiently connected with the unloading of [the] vessel to make it a part of the seaman's work."<sup>90</sup>

*Violation of Longshoring Regulations as Negligence and Unseaworthiness Per Se; Effect of Violations Upon Comparative Negligence Defense*

In *Kernan v. American Dredging Co.*,<sup>91</sup> the United States Supreme Court held that recovery under the Jones Act was available for injuries or death resulting from the violation of a statutory duty (in that case, a Coast Guard Regulation) whether or not the character of the risk was that which the statute was designed to guard against. The Court further precluded a finding of contributory negligence, employing the provisions of the Safety Appliances Act<sup>92</sup> prescribing safety requirements for railway appliances and equipment which was incorporated into the FELA.<sup>93</sup>

In *Provenza v. American Export Lines, Inc.*,<sup>94</sup> the Court of Appeals for the Fourth Circuit adapted the *Kernan* reasoning to hold that a standard of care could be established by reference to safety regulations where plaintiff was a "Sieracki seaman." However, the question whether comparative negligence was available as a defense to a longshoreman's action under the doctrine of unseaworthiness against the vessel and, if so, what rules governed findings of comparative negligence, were left open.

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88. *Id.*

89. 314 F. Supp. 1278 (E.D. La. 1970).

90. *Id.* at 1281.

91. 355 U.S. 426 (1958).

92. 45 U.S.C. §§ 1-16 (1970).

93. 45 U.S.C. §§ 51-60 (1970).

94. 324 F.2d 660 (4th Cir. 1963).



Several recent decisions of the Court of Appeals for the Fifth Circuit, however, have answered these questions.<sup>95</sup>

The *Provenza* case involved an injury caused by hatch beams struck by a draft of cargo. The evidence indicated the accident was caused by a combination of defective beams and a defective winch. Plaintiff argued that the trial court erred in refusing to submit to the jury the "Safety and Health Regulations for Longshoring"<sup>96</sup> as a basis for his claim of negligence and unseaworthiness. The Fourth Circuit approved the application of these regulations:

"... the plaintiff was entitled to have put before the jury the definite standards set up in the regulations promulgated by the Secretary of Labor defining reasonably safe conditions in the exact area involved in this case. Furthermore, we are also forced to the conclusion that in the area covered by the regulations their violation would render the ship unseaworthy, and if such unseaworthiness was the proximate cause of the plaintiff's injury, it would also render the defendant shipowner liable. It follows, of course, that if the jury should find that the stevedore had violated the regulations such conduct could also constitute negligence. If in turn this negligent conduct of the stevedore were known, or by the exercise of reasonable care should have been known to the shipowner, and such negligence of the shipowner was a proximate cause of the plaintiff's injury, then he too would be liable to the plaintiff on the additional grounds of negligence."<sup>97</sup>

Among the numerous district court,<sup>98</sup> court of appeals,<sup>99</sup> and state court<sup>100</sup> decisions allowing application of the regulations

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F.2d 481 (5th Cir. 1969), *cert. denied*, 395 U.S. 986 (1969). See text accompanying notes 102-110 *infra*.

95. *Phipps v. S.S. Santa Maria*, 418 F.2d 615 (5th Cir. 1969); *Manning v. M/V Sea Road*, 417 F.2d 603 (5th Cir. 1969) (holding comparative fault doctrine applicable where unseaworthiness was result of violation of "Safety and Health Regulations for Longshoring"); *Neal v. Saga Shipping Co.*, 407

96. Safety and Health Regulations for Longshoring, 29 C.F.R. § 1504.1 (1971).

97. *Provenza v. American Export Lines, Inc.*, 324 F.2d 660, 665 (4th Cir. 1963).

98. See, e.g., *N. M. Paterson & Sons, Ltd. v. Nicholson Cleveland Terminal Co.*, 323 F. Supp. 913, 916 (N.D. Ohio 1971).

99. See, e.g., *Reid v. Quebec Paper Sales & Transp. Co.*, 340 F.2d 34 (2d Cir. 1965).

100. See, e.g., *Cresap v. Pacific Inland Navigation Co.*, 478 P.2d 223 (Wash. 1970).

was the Fifth Circuit decision in *Marshall v. Isthmian Lines, Inc.*,<sup>101</sup> which limited the full *Kernan* rule in the longshoreman's area by requiring a showing that the regulation be designed to protect against the particular hazard encountered. Three Fifth Circuit decisions handed down in the last two years have established the application of the defense of comparative negligence in this area, although liability is based upon a violation of a safety regulation, and have limited the proportion of such comparative negligence to fifty per cent where a single violation is proven to have caused the injury sued upon.<sup>102</sup>

The *Neal* decision involved an appeal from the trial court's assessment of comparative negligence against the decedent in the amount of fifty per cent. Plaintiff argued that since liability was founded upon unseaworthiness brought about by a violation of certain Coast Guard regulations relative to damaged bindings on bales of cotton, the defense of comparative negligence was not available for such a statutory violation. This favored position was rejected as one reserved exclusively for Jones Act seamen through the application of the FELA<sup>103</sup> and Safety Appliances Act.<sup>104</sup> The court said:

"The appellants' argument is based on the hypothesis that the Jones Act applies to *longshoremen* and the resultant conclusion that they are entitled to the protection of the Federal Employer's Liability Act. But the premise itself is faulty: on the very day the Supreme Court recognized in *Sieracki* that the vessel owner owes a warranty of seaworthiness to longshoremen because the duty to provide a seaworthy vessel extends to all who perform the ship's services, it held in *Swanson v. Marra Brothers* that a longshoreman cannot recover under the Jones Act from his employer, the stevedore, for injuries occurring while working on a pier.

"Longshoremen are entitled to the warranty of seaworthiness. They are not entitled to the statutory remedy provided by the Jones Act because they do not meet the requirements of that Act. '*Sieracki* does not abrogate the rule that the

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101. 334 F.2d 131 (5th Cir. 1964).

102. *Phipps v. S.S. Santa Maria*, 418 F.2d 615 (5th Cir. 1969); *Manning v. M/V Sea Road*, 417 F.2d 603 (5th Cir. 1969); *Neal v. Saga Shipping Co.*, 407 F.2d 487 (5th Cir. 1969), *cert. denied*, 395 U.S. 986 (1969).

103. 45 U.S.C. §§ 51-60 (1970).

104. *Id.* § 1-16.

Jones Act applies only where the relationship of employer and employee exists.'"<sup>105</sup>

In *Manning v. M/V Sea Road*,<sup>106</sup> a longshoreman had fallen through a manhole cover on the vessel a few hours before Manning had his accident, and Manning was aware of this. As he was walking backwards directing a trucklift over a ramp, he fell through the same manhole cover which had not been replaced. Finding that a specific longshoring regulation had been violated and that this violation was negligence per se, the court made clear that negligence of this nature could be shown at trial on the merits to create a condition of unseaworthiness. Accordingly, although Manning was found to have been negligent in the first trial, the Fifth Circuit held that the fault would have to be shared in view of the shipowner's violation of longshoring regulations.<sup>107</sup>

Further refinement of this rule was furnished by the Fifth Circuit's decision in *Phipps v. S.S. Santa Maria*,<sup>108</sup> where unseaworthiness of the vessel based upon violation of the safety regulations was found to be the cause of injury. The Fifth Circuit applied *Marshall* and *Manning*, and further stated:

"As in *Manning*, it would in these circumstances defeat the Congressional objective of achieving industrial safety to permit the victim of flagrant violation as to beam locks to bear more of a responsibility for this than the shipowner. *The maximum contributory negligence, attributable to claimant on this score would, therefore, be fifty per cent.*" (Emphasis added.)<sup>109</sup>

Moreover, the court said that the lower court's assessment of fifty per cent negligence ignored a *second* violation of the shipowner adduced by the evidence, and strongly indicated it felt the latter should bear more than fifty per cent of the damages under such conditions.

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105. *Neal v. Saga Shipping Co.*, 407 F.2d 481, 486 (5th Cir. 1969).

106. 417 F.2d 603 (5th Cir. 1969).

107. This opinion contains a full discussion of the applicable regulations. *Id.* at 606-09, nn. 2-7. See also *Kwarta v. United States Lines, Inc.*, 315 F. Supp. 112 (D.C. Md. 1970); *Simmons v. Gulf & South Am. S.S. Co.*, 260 F. Supp. 525 (E.D. La. 1966), *aff'd*, 394 F.2d 504 (5th Cir. 1968).

108. 418 F.2d 615 (5th Cir. 1969).

109. *Id.* at 617.

## DEFENSES

*Comparative Negligence ("Proportionate Fault") Available  
As Defense; Assumption of Risk Inapplicable*

The general rule has been well stated by the Ninth Circuit in *Curry v. Fred Olsen Line*:<sup>110</sup>

"The Federal rule in unseaworthiness cases is that contributory negligence is not a complete bar, but only serves to mitigate damages."

Some degree of divergence exists between the rules as they relate to actions under the Jones Act and those brought by longshoremen or Sieracki seamen; this divergence is most pronounced in the area of violation of safety regulations. However, while the defense of comparative negligence is available to respondents in a longshoreman's action under the doctrine of unseaworthiness, the defense of assumption of risk is not available, since "[n]either a blue water seaman nor a Sieracki-sailor-longshoreman assumes any risk of unseaworthiness."<sup>111</sup> Several opinions have treated the distinctions between these two doctrines, such as that of the Fourth Circuit in *Bryant v. Partenreederei-Ernest Russ*.<sup>112</sup> There a ship ceiler lost his balance while attempting to force a warped board into place by hammering on it. The Fourth Circuit reversed the lower court's assessment of fifty per cent comparative negligence, stating:

". . . we think there is no foundation in the record for a finding of contributory negligence. Concededly, in attempting to hammer the board into place the appellant did only what other workers in similar circumstances did habitually. The District Court expressly found that the way in which Bryant was performing his work was not in any way different from the normal and customary manner in which such work was conducted; that it often became necessary for a man to stand on the hatch coaming to drive in the boards and that this was customary procedure in fitting precut grain board. This was not negligence, and to call it contributory negligence is

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110. *Curry v. Fred Olsen Line*, 367 F.2d 921 (9th Cir. 1966). See also *Palermo v. Luckenbach S.S. Co.*, 355 U.S. 20 (1957); *Neal v. Saga Shipping Co., S.A.*, 407 F.2d 481 (5th Cir. 1969). See NORRIS, *THE LAW OF SEAMEN* § 44 (3d ed. 1970).

111. *Neal v. Saga Shipping Co.*, 407 F.2d 481, 485 (5th Cir. 1969).

112. 352 F.2d 614 (4th Cir. 1965).

tantamount to charging the plaintiff with assumption of risk under another name."<sup>113</sup>

In the event plaintiff can show that he used an unseaworthy part of a vessel in its defective condition at a time when he had no choice but to use it as it was,<sup>114</sup> or if he continues to work under conditions he knows to be hazardous but has no choice except to work under these conditions,<sup>115</sup> the finder of fact may properly reject the defense of contributory negligence altogether. In *Burrage v. Flota Mercante Grancolombiana S.A.*,<sup>116</sup> the Fifth Circuit gave the following reasons for affirming a rejection of the defense of contributory negligence where the worker continued to work under unsafe conditions:

"In assaying the problem the trier is entitled to take into consideration the realities of the situation, the economic dependence of the worker on continued employment, and the law's general approach that in fostering industrial safety the burden of noncompliance with standards of care is ordinarily placed directly on the employer, not wholly on the injured victim. *Manning v. M/V Searoad*, 5 Cir., 1969, 417 F.2d 603, 1970 A.M.C. 145. It was reasonable under the circumstances for the workmen to continue working."<sup>117</sup>

The Third Circuit case of *Mroz v. Dravo Corp.*,<sup>118</sup> a proceeding under the Jones Act, contains language which seems to mix notions of contributory negligence and the repudiated doctrine of assumption of the risk. The court there said:<sup>119</sup>

"If a person by his own action subjects himself unnecessarily to danger which should have been anticipated and is injured thereby, he is guilty of contributory negligence."

The *Burrage* language, however, by emphasizing the "economic realities of life" and placing the burden largely on the shipowner or employer, seems to reject the reasoning found in *Mroz*.

Some vague boundaries may be delimited by consulting the

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113. *Id.* at 615-16.

114. *San Pedro Compania Armadoras, S.A. v. Yannacopoulos*, 357 F.2d 737 (5th Cir. 1966).

115. *Burrage v. Flota Mercante Grancolombiana, S.A.*, 431 F.2d 1229 (5th Cir. 1970).

116. *Id.*

117. *Id.* at 1232.

118. 429 F.2d 1156 (3d Cir. 1970).

119. *Id.*

language in an earlier decision of the Third Circuit, *Klimaszewski v. Pacific-Atlantic Steamship Co., Inc.*,<sup>120</sup> where it was said:

"In nearly every occupation, there is some inherent and unavoidable risk which does not arise out of negligence or defective equipment . . . but seamen and longshoremen do not assume the types of risks which caused injury to plaintiff in this case, namely, negligence of another or a vessel which is unseaworthy."<sup>121</sup>

The Ninth Circuit has noted the importance of alternative courses of action to those available to the injured party in determining his contributory negligence. That court, in *DuBose v. Matson Navigation Co.*,<sup>122</sup> observed that "the concept of contributory negligence becomes operative only when alternative courses of action are available to the injured party and he chooses the unreasonable course." It should be noted that the Court in *Mroz*, citing *Dubose*, attempted to delimit its language with reference to contributory negligence by noting that the general rule would apply where it was found as a fact that plaintiff had the possibility of securing relief by informing his superiors of any unsafe conditions, but continued to work without doing so.

*The Usner Decision—A Single Negligent Act of Longshoremen Causing Instantaneous Injuries Is Insufficient to Constitute Unseaworthiness*

Before *Usner*, the Second, Third, and Fourth Circuits had held that the negligent act of a fellow longshoreman using safe and proper equipment could render the vessel unseaworthy.<sup>123</sup> The Fifth Circuit, in accord with the Ninth Circuit, had rejected this theory of "instant unseaworthiness," holding that the operational negligence of a longshoreman occurring at the moment of injury to a co-worker did not render the vessel unseaworthy.<sup>124</sup>

This conflict between the circuits which existed before January 25, 1971, was settled when the Court handed down its five-four decision on that date in the case of *Usner v. Luckenbach Overseas Corp.*<sup>125</sup>

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120. 246 F.2d 875 (3d Cir. 1957).

121. *Id.* at 877.

122. 403 F.2d 875 (9th Cir. 1968).

123. Note, 2 J. OF MARITIME L. & COM. 871 (1971).

124. *Usner v. Luckenbach Overseas Corp.*, 91 S.Ct. 514, 516 n.2 (1971).

125. *Id.*

The facts indicated that Usner was engaged in loading operations in the Port of New Orleans on a barge moored alongside the S.S. Edgar F. Luckenbach. His job was to break out bundles of cargo by securing the cargo to a sling attached to the fall each time it was lowered from the ship's boom by the winch operator. At one time Usner found the sling beyond his reach and motioned to the flagman standing on the deck of the ship to direct the winch operator to lower the fall. The winch operator lowered the fall too fast and it struck petitioner, causing the injuries sued upon. The Supreme Court eliminated from its consideration any difficulty with the winch, boom, fall, sling or any other equipment or appurtenances of the ship, its cargo or its crew. After discussing various examples of unseaworthiness which have been set forth earlier in this Article, the Court pointed out that Usner's injury was caused by:

"... the isolated, personal negligent act of the petitioner's fellow longshoremen. To hold that his individual act of negligence rendered the ship unseaworthy would be to subvert the fundamental distinction between unseaworthiness and negligence. . . ." <sup>126</sup>

The *Usner* opinion stressed the divorcement of unseaworthiness from principles of negligence. It emphasized that unseaworthiness was a *condition* and characterized the manner in which that condition came into being as "quite irrelevant to the owner's liability." <sup>127</sup>

One writer has predicted that a consequence of this decision will be the attempt by plaintiffs' attorneys to show that their clients' injuries resulted from a continuing, dangerous "condition." <sup>128</sup> This attempt will necessarily perpetuate the employment of a "time test" to determine how long before the injury the "operational negligence" occurred in order to decide whether a "condition" existed. Such a problem is found in *Trawler Racer* <sup>129</sup> and its progeny, which eliminated any consideration of "notice" to the shipowner as a prerequisite for a finding of unseaworthiness. For instance, in *Grigsby v. Coastal Marine Service*, <sup>130</sup> the Fifth Circuit held that "an appreciable length of time"

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126. *Id.* at 518.

127. *Id.* at 517.

128. Note, 2 J. OF MARITIME LAW & COM. 871 (1971).

129. *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539 (1960).

130. 412 F.2d 1011 (5th Cir. 1969).

had passed since the occurrence of the negligent act and a "condition" had resulted from the prior negligence.<sup>131</sup> In *Dillon v. M. S. Oriental Inventor*,<sup>132</sup> an "unseaworthy man" case, the court said:

"The impairment to Lewis' knee was a condition which had existed for over five hours at the time of the injury. It indicated that Lewis lacked the reasonably necessary fitness for the task at hand. Therefore, it was not clear error for the trial court to have found that Lewis' return to work after he injured his knee introduced an unseaworthy condition under the circumstances of this case."<sup>133</sup>

*Usner* itself required an examination of the theoretically prohibited time element, and notions of "notice" and negligence were injected into the decision when the Court made the following statement in concluding its opinion:

"In *Trawler Racer*, *supra*, there existed a condition of unseaworthiness, and we held it was error to require a finding of negligent conduct in order to hold the shipowner liable. The case before us presents the other side of the same coin. For it would be equally erroneous here, where no condition of unseaworthiness existed, to hold the shipowner liable for a third party's single and wholly unforeseeable act of negligence."<sup>134</sup>

Moreover, the "Sieracki-seaman" has once again been accorded a lesser status than a true seaman, for the court implied that instantaneous negligence of a member of the ship's crew causing the same injuries might have called for a different result. It was careful to point out, by way of footnote, that "no member of the ship's crew was in any way involved in this case."<sup>135</sup>

The Court has repeatedly held that injuries caused by a seaman with vicious proclivities (instantaneously) are covered by the doctrine of unseaworthiness.<sup>136</sup> The reason for this inconsistency has been suggested by one commentator<sup>137</sup> to be "consid-

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131. *Id.* at 1032.

132. 426 F.2d 977 (5th Cir. 1970).

133. *Id.* at 979-80.

134. 91 S.Ct. 514, 518 (1971).

135. *Id.* n.18.

136. *See* *Boudoin v. Lykes Bros. S.S. Co.*, 348 U.S. 336 (1955), and authorities cited therein.

137. Note, 31 LA. L. REV. 650 (1971).



erations of equitable treatment for the shipowner who has no control over the competence of stevedores."<sup>138</sup> It would appear the Court had such factors in mind when it spoke of the erroneous result which would follow from holding a shipowner liable for a "third party's"<sup>139</sup> act of negligence.

*Application of the Equitable Doctrine of Laches to  
Actions for Unseaworthiness*

What period of limitations governs the longshoreman's action against the vessel? The cases have considered the United States Supreme Court's opinion in *McAllister v. Magnolia Petroleum Co.*<sup>140</sup> to stand for the proposition that the general maritime law doctrine of laches applied, with the three-year period of limitations set forth in the analogous provisions of the Jones Act to be used as a guideline.<sup>141</sup> As said in *Banks v. United States Lines Co.*<sup>142</sup> "McAllister has effectively invoked a three-year limitation as to a personal injury action predicated upon unseaworthiness." The Fourth Circuit's decision in *Giddens v. Isbrandtsen Co.*<sup>143</sup> set forth the following definition of "laches":

"Laches is sustainable only on proof of both of two elements: '(1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.'"<sup>144</sup>

The decisions have established a presumption of prejudice to a respondent with respect to a claim for damages based on unseaworthiness asserted more than three years after the cause of action has arisen, under which the burden shifts to the plaintiff to rebut this presumption.<sup>145</sup> The Fifth Circuit has treated this area in *Flowers v. Savannah Machine and Foundry Co.*,<sup>146</sup> which rejected reference to the state period of limitation in favor of employing the Jones Act period of three years. Noting the

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138. *Id.* at 659.

139. *Usner v. Luckenbach Overseas Corp.*, 91 S.Ct. 514 (1971).

140. *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221 (1958).

141. *See, e.g.*, *Banks v. United States Lines Co.*, 293 F. Supp. 62 (E.D. Va. 1968).

142. *Id.* at 66.

143. *Giddens v. Isbrandtsen Co.*, 355 F.2d 125 (4th Cir. 1966).

144. *Id.* at 127.

145. *Flowers v. Savannah Machine & Foundry Co.*, 310 F.2d 135 (5th Cir. 1962).

146. *Id.*

wide disparity between the periods of limitation in the six maritime states comprising the Fifth Circuit, the court stated:

"And now, whether the case is in the federal court on the law side or the admiralty side or in a state court, federal maritime standards are solely controlling."<sup>147</sup>

A recent decision of the Ninth Circuit, *King v. Alaska Steamship Co.*,<sup>148</sup> reaches a similar result. This decision, like that in *Flowers*, was based upon the decision of the United States Supreme Court in *Kermarec v. Compagnie Generale Transatlantique*.<sup>149</sup> The court reasoned that under the *Kermarec* doctrine the legal rights and liabilities arising from the conduct in question in these suits are measurable by standards of maritime law.<sup>150</sup>

#### *Maritime Rights Control Over State Law Defenses*

In a recent decision of the Fifth Circuit, the *Burrage* case,<sup>151</sup> the shipowner urged the substituted employer bar of Section 6 of the Louisiana Compensation Act. That section provides that if the work being done for a principal by a contractor is part of the principal's "trade, business or occupation," the principal is liable to pay compensation to any employee of the contractor.<sup>152</sup> If that test is met, the exclusivity provision of the Act<sup>153</sup> comes into play to cut off any damage suit claim. The court decided that this state principle, which would be a bar to effectual enforcement of the maritime right, cannot constitutionally be applied since it would work material prejudice to the characteristic features of the general maritime law and would interfere with the proper uniformity of that law contrary to article 3, section 2 of the Constitution.<sup>154</sup>

#### CONCLUSION

While the tides ran fast in the past year in favor of the longshoremen in the "loading-unloading" area treated in *Chagois*

147. *Id.* at 138.

148. 431 F.2d 994 (9th Cir. 1970).

149. 358 U.S. 625 (1959).

150. See also *Larios v. Victory Carriers, Inc.*, 316 F.2d 63 (2d Cir. 1963).

151. *Burrage v. Flota Mercante Grancolombiana, S.A.*, 431 F.2d 1229 (5th Cir. 1970).

152. LA. R.S. 23:1061 (1950).

153. *Id.* at § 1032.

154. See also *Bagrowski v. American Export Isbrandtsen Lines, Inc.*, 440 F.2d 502 (7th Cir. 1971).

and *Law*, *Usner* is one of most limiting decisions to be rendered by the United States Supreme Court in the area of longshoremen's remedies. The expansion process culminating in *Chagois* and *Law* has brought cries for congressional action such as that voiced by the Court in *Forkin*.<sup>155</sup> That legislation is now pending in Congress and would eliminate the longshoreman's action against the vessel while effecting an increase in his weekly benefits under the Longshoremen's and Harbor Workers' Act.<sup>156</sup>

While this legislation has been deemed necessary by the shipping industry and its representatives, the plaintiffs' bar views it as a frustration of the "humanitarian motivations" which prompted the decisions in *Sieracki* and its progeny. Although the prospects for passage of this legislation are uncertain at the time of this writing, the legislative restrictions on longshoremen's rights under consideration will result, if enacted, in large part from the fact that the warranty of seaworthiness, in the words of a Louisiana Court of Appeal opinion in this area, "has been taken upon the judicial anvil and hammered into an unexpected shape."<sup>157</sup>

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155. *Forkin v. Furness, Withy & Co.*, 323 F.2d 638 (2d Cir. 1968).

156. S. 525, 92d Cong., 1st Sess. (1971); H.R. 247, 92d Cong., 1st Sess. (1971).

157. *Jackson v. Lykes Bros. S.S. Co.*, 185 So.2d 342, 345 (La. App. 4th Cir. 1966).